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April 13, 2004

VIA ELECTRONIC SUBMISSION

Ms. Marlene H. Dortch
Secretary
Office of the Secretary
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

RE: **Memorandum of Ex Parte Presentation**
WC Docket No. 04-30, Emergency Request for Declaratory Ruling

Dear Ms. Dortch:

On April 12, 2004, Paul Mancini, Peggy Garber, Ramona Carlow, George Moreira, John Andrasik, Christopher Heimann and the undersigned met with Michelle Carey, Julie Veach, Denise Coca and Russ Hanser of the Wireline Competition Bureau's Competition Policy Division to discuss SBC's position in the above referenced docket. The attached outline was used as a basis for discussion during the meeting.

Pursuant to Section 1.1206(b) of the Commission's rules, this letter and attachment are being electronically filed. I ask that this letter be placed in the files for the proceedings identified above.

Please call me should you have any questions.

Sincerely,

/s/ Brian J. Benison

Attachment

CC: Michelle Carey
Julie Veach
Denise Coca
Russ Hanser

SBC Connecticut
April 12, 2004
WC Docket No. 04-30

THE COMMISSION SHOULD ACT ON SBC CONNECTICUT'S PETITION AND DECLARE THE DPUC'S DECISION UNLAWFUL

1. The Connecticut Superior Court Decision Does Not Moot SBC Connecticut's Request for Declaratory Ruling.

- On April 1, the New Britain, Connecticut Superior Court vacated, remanded and stayed the DPUC's decision requiring SBC Connecticut (SBC) to unbundle its hybrid fiber coaxial facilities because the DPUC failed to consider whether unbundling those facilities was technically feasible, as required by state law.

- While the DPUC's decision thus is not currently in effect, the court's decision does not moot SBC's petition.

    - The court did not address the merits of SBC's claims that the DPUC's decision was inconsistent with federal law, including the Telecommunications Act of 1996 and the Commission's implementing rules; the court deferred consideration of those issues because they are pending before this Commission.

    - The court, nevertheless, stated that "the DPUC correctly determined that the HFC facilities constitute UNEs (unbundled network elements) which are used to provide telecommunications services and that their unbundling is in the public interest and consistent with federal law." *Southern New England Telephone Co. v. Connecticut Dept. of Pub. Util. Control, et al.*, No. CV 04 0525443S, Slip Op. at 5 (Sup. Ct. New Britain Apr. 1, 2004). SBC has sought clarification that the Court was not reaching the merits of those issues, but rather merely was acknowledging that the DPUC's decision addressed those questions as required by state law.

    - In any event, the court's statements are inconsistent with federal law for the reasons articulated in SBC's petition.

- Based on its filings in this proceeding, it is clear that, absent Commission action on SBC's petition, the DPUC quickly will adopt an order concluding that it is technically feasible to unbundle the HFC facilities and require SBC to provide access to those facilities. Because such a decision would thwart the Commission's broadband policy, the Commission should act on SBC's petition to clarify that any decision requiring SBC to unbundle the HFC network would be inconsistent with federal law and policy, and therefore preempted.

2. The DPUC's Decision is Inconsistent with the Express Limits on Unbundling In the 1996 Act and the D.C. Circuit's Decision in *USTA II*.

- The HFC facilities at issue do not fall within the definition of a network element and thus are not subject to unbundling.

    - The 1996 Act defines a network element as "a facility or equipment used in the provision of a telecommunications service," which, in turn, is defined as "the offering of telecommunications for a fee directly to the public . . ." 47 U.S.C. §§ 153(29), 153(46).

    - The HFC facilities at issue are not part of SBC's local network and were never used to provide telecommunications to the public, nor can they currently be used to provide telecommunications, as the DPUC itself recognized in 2000 in holding that the facilities were not "used or useful" for providing telecommunications. While SBC did conduct a limited trial of HFC-based telephony in 1995, it never offered HFC-telephony to the general public, and therefore did not offer telecommunications services over the HFC network. The HFC facilities thus are not network elements subject to unbundling.

    - The DPUC's reliance on the FCC's treatment of dark fiber is inapposite because, unlike dark fiber, the HFC facilities are not routinely used to provide telecom services, nor are they "easily called into service." *Triennial Review Order* at para. 58. Indeed, the Telco would have to spend millions of dollars to call the HFC facilities into service.

- The DPUC failed to consider the availability of alternatives to the HFC network – including incumbent tariffed and resold services, as well as other network elements – as required under the Act.

    - As the court in *USTA II* held, the "impairment analysis [under the Act] must consider the availability of [ILEC] . . . services when determining whether would-be entrants are impaired . . . What the Commission may not do is compare unbundling only to self-provisioning or third-party provisioning, arbitrarily excluding alternatives offered by the ILECs." Slip Op. at 33.

    - SBC offers a variety of tariffed services (and, as discussed below, other network elements) that Gemini could use to provide the types of broadband services it seeks to offer.

- Even if the DPUC has independent state authority to compel additional unbundling, which it does not, Conn. Gen. Stat. Sec. 16-247b(a) requires that unbundling be consistent with federal law.

- As the D.C. Circuit has recognized, the unbundling provisions of the 1996 Act require a balancing of competing interests. *United States Telecom. Ass'n v. FCC*, 290 F.3d 415, 427 (D.C. Cir. 2002). Congress assigned this task to the Commission and, as the *USTA II* court just held, Congress precluded the Commission from sharing that authority. *USTA II* at 12-18.

- Any attempt by states to usurp this statutory balancing necessarily would thwart both congressional intent and the Commission's unbundling authority. The DPUC thus cannot require SBC to unbundle its HFC network without regard to the clear limits on unbundling established by the 1996 Act.

3. The DPUC's decision cannot be reconciled with the Commission's unbundling rules and policies adopted in the *Triennial Review Order*.

- Next Generation Loops. In the *Triennial Review Order,* the Commission distinguished between legacy copper facilities, which were subject to unbundling, and non-copper, next-generation broadband facilities, which were not.

  - The Commission concluded that CLECs are not impaired in their ability to provide broadband services without access to next generation facilities, and that limiting access to such facilities would encourage CLECs and ILECs to invest in next generation networks, consistent with section 706. *Id.* at para. 290-291.

  - The Commission therefore held that copper loops and TDM-based DS1 and DS3 loops were the only loop facilities that must be unbundled; it declined to require ILECs to unbundle next-generation loops for the provision of broadband services. *Triennial Review Order* at paras. 272, 286, 288 & n.850.

  - The FCC also specifically ruled that CLECs are not impaired without access to, and an ILEC thus need not unbundle, next-generation loops to provide even narrowband services if the ILEC provides access to copper loop facilities. *Id.* at para. 296; *see also* 47 C.F.R. § 51.319(a)(2)(iii). Whether the HFC facilities to which Gemini seeks access are next-generation, hybrid loop facilities, as the DPUC held, or are some other species of loop is irrelevant. In either case, the Commission already has determined that CLECs are not impaired if the ILEC provides access to copper loops.

  - The D.C. Circuit upheld each of these determinations in *USTA II* as a proper application of the Commission's authority under section 251(d)(2) and section 706. *USTA II*, Slip Op. at 34-46.

  - The DPUC's conclusion that, despite the availability of copper loops, Gemini would be impaired without access to the HFC network (on the ground that HFC facilities are "more efficient" than copper twisted pair[s]") is flatly inconsistent with these holdings, and thus unlawful.

- State commissions are bound by the Commission's unbundling determinations. The Commission's decision not to require unbundling of next-generation broadband facilities "takes on the character of a ruling that no such regulation is appropriate or approved pursuant to the policy of the statute," precluding inconsistent state requirements. *Bethlehem Steel Co. v. New York State Labor Relations Bd.*, 330 U.S. 767, 774 (1947); *Geier v. American Honda Motor Co.*, 529 U.S. 861 (2000) (holding that a state law requiring car manufacturers to install airbags immediately must give way to federal law because it conflicted with DOT's policy determination that requiring immediate installation of airbags would undermine other policy goals).

- Routine Network Modifications. The DPUC's decision also conflicts with the FCC's network modification rules, and the requirements of the Act.

  - The FCC only required ILECs to make "routine modifications," which it defined as "an activity that the incumbent LEC regularly undertakes for its own customers," to transmission facilities. 47 C.F.R. § 51.319(a)(8); *Triennial Review Order* at paras. 632-40. The FCC explained that, under section 251(c)(3), ILECs cannot be required "to *alter substantially* their networks" in order to provide access to UNEs. *Triennial Review Order* at para. 630 (emphasis in original) (citing *Iowa Utils. Bd. v. FCC*, 120 F.3d at 813).

  - Providing unbundled access to the facilities at issue would require the Telco to spend millions of dollars to upgrade and maintain those facilities, activities that the Telco plainly has no need to and would not undertake for its own customers.

- Unbundling Analysis. In ordering the Telco to unbundle the HFC facilities, the DPUC flouted the unbundling standards of the Act as interpreted by the Commission and the federal courts.

  - The DPUC's exclusive focus on Gemini's business plan was flatly inconsistent with the Commission's statement that a carrier-specific analysis is improper. *Triennial Review Order* at para. 115 ("we cannot order unbundling merely because certain competitors . . . with certain business plans are impaired").

  - The DPUC also ignored the Commission's instructions that the Act requires consideration of the availability of facilities from alternative sources, including (among other things) other network elements, as part of the impairment analysis. *Id.* at para. 291.

  - Likewise, as discussed above, the DPUC ignored SBC's retail and tariffed offerings, contrary to the D.C. Circuit's decision in *USTA II*. Slip Op. at 33.

4. Responses to Staff's Questions:

- **History of Negotiations.**

    - In the course of proceedings to shut down the CATV system in early 2000, Gemini approached SBC to discuss acquiring the subject facilities. In February 2000, SBC provided Gemini information concerning the HFC network and other CATV assets owned by its cable affiliate (SPV). These discussions did not go anywhere, and SPV proceeded to sell most of its CATV assets to the highest bidder, leaving only the fiber, coax, active and passive devices, and drops and NIDS.

    - On June 25, 2002, Gemini again approached SBC, requesting negotiations to lease portions of the HFC network as UNEs under section 251. On July 3, 2002, SNET rejected Gemini's request, but continued discussions with Gemini over the rest of the summer regarding the status of the HFC facilities, and, on September 10, 2002, formally offered to sell those facilities to Gemini at a market-based price, based on an accounting appraisal of the value of the facilities by an independent accounting firm, plus the cost of relocating the facilities off of SBC's gain on telephone poles. Gemini never made a counter-offer to SBC's proposal, and instead filed a petition for declaratory ruling that SBC must make the facilities available at TELRIC rates on January 2, 2003.

- **How is the Preemption Analysis Affected, if at all, if There is a Conflict Between State Action and the Rationale Underlying a Federal Policy, Rather than the Actual Policy itself?** The analysis does not change. Section 706 identifies as one of the Act's goals encouraging deployment of broadband services to all Americans through, among other things, deregulation. The Commission sought to implement this goal by declining to require ILECs to unbundle broadband facilities, such as those at issue here. Its rationale for so doing was, among other things, that: (a) limiting access to those facilities would give ILECs incentives to develop and deploy broadband facilities and services, while forced access would inhibit ILEC investment by reducing ILEC returns on investment; (b) requiring unbundling would blunt innovation by locking CLECs into technology choices by ILECs; and (c) denying CLECs access to ILEC broadband capabilities would stimulate them to seek innovative options, including self-deployment. *Triennial Review Order* at 290. The Commission's decision not to require unbundling of broadband facilities thus constitutes a specific policy judgment about how the 1996 Act's congressionally mandated objectives would best be promoted. The DPUC is not free to substitute its judgment for that of the Commission. *Bethlehem Steel Co. v. New York State Labor Relations Bd.*, 330 U.S. 767, 774 (1947); *Geier v. American Honda Motor Co.*, 529 U.S. 861 (2000).

- **How Is the Section 706 Analysis Regarding Incentives to Invest Affected Once Facilities Already Are Built?** Mandated access to ILEC broadband facilities chills ILEC incentives to develop and deploy advanced telecommunications infrastructure regardless of whether those facilities are already built. Obviously, forced access to

broadband facilities that already have been deployed will not prevent deployment of those specific facilities, but it will chill deployment of additional broadband facilities as well as investment in research, development and deployment of further, innovative technologies. Requiring SBC to unbundle the HFC facilities at issue thus not only would divert resources that could be used to deploy other, more promising broadband facilities to upgrade and maintain the HFC network, but also undermine its incentive to develop and deploy fiber and other broadband facilities.

- **What is the Cost to SBC of Unbundling the HFC facilities, Given That Gemini Has Offered to Take the Facilities "As Is"?** SBC estimates that it would cost more than $10 million to reactivate the HFC facilities, $5 million to develop new operations support systems for ordering, provisioning, maintenance and repair of the facilities, and $5 million annual to hire and maintain a dual workforce to operate the HFC network. In any event, SBC cannot allow Gemini to upgrade and maintain the HFC facilities, both for network security and control reasons, and because SBC's unionized workforce would object to anyone else performing work they previously performed on SBC facilities.

- **Given that the *Triennial Review Order* Remains in Effect, How Should the Commission Take the *USTA II* Decision into Account?** The D.C. Circuit upheld the Commission's decisions not to unbundle broadband, supporting our position that the HFC network should not be unbundled. Indeed, the decision provides additional support for our position because it confirms that the DPUC's impairment analysis was infirm because it unlawfully failed to consider the availability of alternatives to unbundling the HFC network (such as other UNEs and ILEC tariffed and resold services) and unlawfully focused solely on Gemini's business plan in ordering unbundling.

- **Does SBC Offer Alternatives to the HFC Facilities?** Yes; copper loops are available as UNEs or at resale pursuant to tariff and ICA. SBC also offers fiber loops and dark fiber to the extent required by the *Triennial Review Order* pursuant to state tariff, as well as video transport pursuant to its MultiChannel Video Services Tariff (FCC Tariff 39).

- **Is There Anything to Gemini's Claim That the HFC Facilities Block Its Access to Poles?** No. HFC facilities are connected to only 15 percent of SBC's poles, and 25 percent of these facilities are over-lashed to SBC's loop infrastructure, and thus take up no more space on the poles than SBC's other loop facilities. Generally, the decommissioned HFC facilities have had little impact on CLEC attachments. But, to the extent it has, it has had no greater impact on Gemini than any other CLEC.